

Court File No. **FM-76-23**

N° du dossier

IN THE COURT OF KING'S BENCH OF  
NEW BRUNSWICK

DANS LA COUR DU BANC DU ROI DU  
NOUVEAU-BRUNSWICK

TRIAL DIVISION

DIVISION DE PREMIÈRE INSTANCE

JUDICIAL DISTRICT OF FREDERICTON

CIRCONSCRIPTION JUDICIAIRE DE  
FREDERICTON

IN THE MATTER of an application for  
judicial review and declaratory relief  
pursuant to Rule 69 and Rule 38 of the New  
Brunswick *Rules of Court*

DANS L'AFFAIRE d'une requête en  
revision judiciaire et de jugement  
déclaratoire en vertu de la règle 69 et la  
règle 38 des Règles de procédure du  
Nouveau-Brunswick

BETWEEN:

ENTRE:

**THE CANADIAN CIVIL LIBERTIES  
ASSOCIATION**

**THE CANADIAN CIVIL LIBERTIES  
ASSOCIATION**

Applicant

Requérant

- and -

- et -

**THE PROVINCE OF NEW  
BRUNSWICK, as represented by the  
MINISTER OF EDUCATION AND  
EARLY CHILDHOOD  
DEVELOPMENT**

**LA PROVINCE DU NOUVEAU-  
BRUNSWICK, représentée par le  
MINISTRE DE ÉDUCATION ET  
DÉVELOPPEMENT DE LA PETITE  
ENFANCE**

Respondent

Intimée

**NOTICE OF APPLICATION  
(FORM 16D)**

**AVIS DE REQUÊTE  
(FORMULE 16D)**

TO:

DESTINATAIRE:

**THE MINISTER OF EDUCATION AND  
EARLY CHILDHOOD  
DEVELOPMENT**

**LE MINISTRE DE ÉDUCATION ET  
DÉVELOPPEMENT DE LA PETITE  
ENFANCE**

Place 2000  
250 King St  
P.O. Box 6000  
Fredericton, NB E3B 5H1

Place 2000  
250 rue King  
C.P. 6000  
Fredericton, N-B E3B 5H1



LEGAL PROCEEDINGS HAVE BEEN  
COMMENCED BY FILING THIS NOTICE  
OF APPLICATION.

The applicant will make an application  
before the Court at .....  
..... (specific location) .....  
....., on the ..... day of .....  
....., 20 ..... at ..... a.m.  
(or p.m.) for an order as set out hereunder.

If you wish to oppose this application you  
must appear at the hearing of the application  
at the place, date and time stated, either in  
person or by a New Brunswick lawyer  
acting on your behalf.

If you intend to appear on the hearing of the  
application and wish to present to the Court  
at that time affidavit or other documentary  
evidence to support your position, you must  
serve a copy of such evidence on the  
applicant or his lawyer and, with proof of  
such service, file it in this Court Office prior  
to the hearing of the application.

If you fail to appear on the hearing of the  
application AN ORDER WHICH MAY  
AFFECT YOU MAY BE MADE IN YOUR  
ABSENCE.

You are advised that:

(a) you are entitled to issue documents and  
present evidence in the proceeding in  
English or French or both;

(b) the applicant intends to proceed in the  
English language; and

(c) if you require the services of an  
interpreter at the hearing you must advise  
the clerk at least 7 days before the hearing.

PAR LE DÉPÔT DU PRÉSENT AVIS DE  
REQUÊTE, UNE POURSUITE  
JUDICIAIRE A ÉTÉ ENGAGÉE.

Le requérant présentera une requête à la  
Cour à ..... (lieu  
précis) ....., le 20 ..... à  
..... h ... en vue d'obtenir  
l'ordonnance décrite ci-dessous.

Si vous désirez contester cette requête, vous  
devrez comparaître à l'audition de la requête  
aux lieu, date et heure indiqués, soit en  
personne ou par l'intermédiaire d'un avocat  
du Nouveau-Brunswick chargé de vous  
représenter.

Si vous prévoyez comparaître à l'audition de  
la requête et désirez présenter à la Cour un  
affidavit ou une autre preuve littérale en  
votre faveur, vous devrez signifier copie de  
cette preuve au requérant ou à son avocat et  
la déposer, avec une preuve de sa  
signification, au greffe de cette Cour avant  
l'audition de la requête.

Si vous ne comparez pas à l'audition de  
la requête, UNE ORDONNANCE  
POUVANT VOUS CONCERNER  
POURRA ÊTRE RENDUE EN VOTRE  
ABSENCE.

Sachez que:

a) vous avez le droit dans la présente  
instance, d'émettre des documents et de  
présenter votre preuve en français, en  
anglais ou dans les deux langues;

b) le requérant a l'intention d'utiliser la  
langue Anglais; et

c) si vous avez besoin des services d'un  
interprète à l'audience, vous devez en aviser  
le greffier au moins 7 jours avant l'audience.

THIS NOTICE is signed and sealed for the Court of King's Bench by **Andrea J. Hull** . . . . ., Clerk of the Court at Fredericton, New Brunswick, on the 6<sup>th</sup> day of September, 2023

  
Andrea J. Hull

(clerk)



CET AVIS est signé et scellé au nom de la Cour du Banc du Roi par . . . . ., greffier de la Cour, à Fredericton, Nouveau-Brunswick, ce jour de septembre, 2023.

(greffier)

Justice Building  
427 Queen Street  
P.O. Box 6000  
Fredericton, NB E3B 5H1

Palais de la Justice  
427 rue Queen  
C.P. 6000  
Fredericton, N-B E3B 5H1

### APPLICATION

On the hearing of this application, the applicant intends to apply for an order that

### REQUÊTE

À l'audition de la présente requête, le requérant a l'intention de demander qu'il soit ordonné que

### I. ORDERS

1. The applicant seeks:

- a. a declaration of public interest standing to bring this Application;
- b. an order for production, pursuant to Rule 69.10, requiring the respondent to produce:
  - i. the whole of the record that led to the development of Policy 713 dated August 17, 2020, including any reasons for the development of the policy, advice provided to the respondent by the Department of Education and Early Childhood Development (Department), consultations with District Education Councils, and consultations with other interested people or groups;
  - ii. the whole of the record that led to the amendment of Policy 713 by revisions dated June 8, 2023 (effective July 1, 2023), including reasons for the decision to amend the policy, advice provided to the respondent by the Department, reviews conducted of the policy, complaints received concerning the policy, consultations with District Education Councils, and consultations with other interested people or groups; and

- iii. the whole of the record that led to the amendment of Policy 713 by revisions dated August 23, 2023 (effective August 17, 2023), including reasons for the decision to amend the policy, advice provided to the respondent by the Department, reviews conducted of the policy, complaints received concerning the policy, consultations with District Education Councils, and consultations with other interested people or groups; and
- c. an order in the nature of *certiorari* quashing the self-identification revisions to Policy 713 dated June 8 and August 23, 2023, and remitting the matter to the respondent for redetermination;
- d. a declaration that the self-identification provisions in the revised Policy 713 are contrary to the rights of 2SLGBTQIA+ students to inclusion in school and to a safe and positive learning environment as guaranteed by the *Education Act*, SNB 1997, c E-1.12 and *ultra vires* the Minister to the extent that the policy prohibits the use of a child's preferred name or preferred pronoun without parental consent;<sup>1</sup>
- e. a declaration that the self-identification provisions in the revised Policy 713 are contrary to the *Human Rights Act*, RSNB 2011, c 171 and *ultra vires* the Minister to the extent that the policy adversely impacts students based on their "gender identity" or "gender expression";
- f. a declaration that the self-identification provisions in the revised Policy 713 are contrary to sections 15, 7, and 2 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 and cannot be demonstrably justified (as required under section 1 of the *Charter*) to the extent that the policy prohibits the use of a child's preferred name or preferred pronoun without parental consent;

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<sup>1</sup> This Notice of Application uses the phrases "preferred name" and "preferred pronoun" because those are the phrases used in Policy 713. However, "preferred" should be replaced by "chosen" to reflect that a name or pronoun corresponding to a person's identity is not a matter of preference but rather a choice intrinsic to their identity.

- g. a declaration under section 52(1) of the *Constitution Act, 1982* that the self-identification provisions in the revised Policy 713 are of no force and effect to the extent that the policy prohibits the use of a child's preferred name or preferred pronoun without parental consent;
- h. interim and interlocutory relief as may be requested by the applicant;
- i. an order requiring each party to bear their own costs of this Application regardless of either party's success in this Application; and
- j. such further and other relief as counsel may advise and this Honourable Court will permit.

*Set out in separate, numbered paragraphs the following:*

*Énoncer ensuite les éléments suivants dans des paragraphes numérotés et distincts:*

- |  |   |
|--|---|
| 1. The capacity of all persons who are parties to the proceeding.                                      | 1. La qualité de toutes les personnes qui sont parties à l'instance.                                  |
| 2. The place of residence of the applicant.  | 2. Le lieu de résidence du requérant.   |
| 3. The grounds to be argued, including a reference to any statutory provision or rule to be relied on. | 3. Les motifs à discuter et les renvois aux dispositions législatives ou règles qui seront invoquées. |
| 4. A list of the documentary evidence to be used at the hearing of the application.                    | 4. Une liste des preuves littérales qui seront utilisées lors de l'audition de la requête.            |

## II. PARTIES

### *A. Applicant*

2. Founded in 1964, the applicant **Canadian Civil Liberties Association (CCLA)** is an incorporated, national, non-partisan, civil society organization dedicated to promoting respect for and observance of fundamental human rights and civil liberties in Canada. The CCLA works to defend and ensure the protection and full exercise of those rights and liberties through research, public advocacy, and litigation.
3. The CCLA has extensive experience in advising government bodies on both legislative and policy issues, and on constitutional and equality rights issues. The CCLA is also actively involved in litigation involving the legitimization or protection of fundamental rights and freedoms, including equality rights.

4. As a public interest organization, the CCLA's mandate is dedicated to the protection of human rights and civil liberties. Its resources and institutional capacity, as well as its past experience as a plaintiff in *Charter* applications, make it well placed to advance this litigation on behalf of individuals affected by the Minister's decision, in the interest of protecting fundamental rights and freedoms more broadly in Canada.

5. The CCLA meets the established legal test for standing as a public interest litigant. There is a serious justiciable issue raised. CCLA has a real stake or genuine interest in the issue. In all the circumstances, the lawsuit is a reasonable and effective way to bring the issue before the Court.

### ***B. Respondent***

6. The respondent **Province of New Brunswick** is responsible for the public education of children in New Brunswick. The Province's representative is the **Minister of Education and Early Childhood Development** who is responsible for administering the *Education Act*, SNB 1997, c E-1.12, including by exercising discretion that is delegated to him by the Legislature under the Act.<sup>2</sup>

## **III. GROUNDS**

### ***A. Overview***

7. This is an application for judicial review and for declaratory relief related to the Minister's decisions (June 8, 2023 and August 23, 2023) to change the self-identification provisions in the Department's sexual orientation and gender identity policy (Policy 713). The changes make school less safe, welcoming, inclusive, and affirming for 2SLGBTQIA+ students.

8. The revised self-identification provisions in Policy 713 create special, restrictive, and harmful rules that apply only to transgender and gender diverse students and not to cisgender students. The rules require that some 2SLGBTQIA+ students be disaffirmed unless they share information with others that they may not wish to share, even in circumstances where sharing the information may create a risk for the student. The rules require that teachers and school staff

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<sup>2</sup> *Education Act*, SNB 1997, c E-1.12, ss 6(b.2), 42(1)



participate in the misgendering or deadnaming of students for indeterminate periods of time, even when this approach is against the advice of school social workers and psychologists.

9. It is well-established that disaffirming 2SLGBTQIA+ students is associated with serious negative health outcomes, including increased risk of depression, anxiety, eating disorders, self-harm, and suicide. The changes to Policy 713 expose 2SLGBTQIA+ students to greater risk of these harms.

10. The changes to Policy 713 were made following a flawed and unfair process by a Minister who exhibited a “closed mind” and a reasonable apprehension of bias. The process excluded education and gender experts as well as 2SLGBTQIA+ students whose rights, privileges, and interests were directly affected.

11. The Minister has not provided reasons for his decision that are capable of review. What the Minister has stated in the Legislature and publicly reveals a decision-making process that was capricious, arbitrary, and insufficiently justified.

12. The changes to Policy 713 are contrary to the legislated rights of 2SLGBTQIA+ students to inclusion and a “positive learning and working environment” protected by the *Education Act*, SNB 1997, c E-1.12.

13. The changes to Policy 713 treat 2SLGBTQIA+ students differently in the provision of educational services, based on their gender identity or gender expression, which is prohibited by the *Human Rights Act*, RSNB 2011, c 171.

14. The changes to Policy 713 are contrary to the *Charter* rights of 2SLGBTQIA+ students, specifically the right to equality and non-discrimination, the right to liberty and security of the person, and the right to freedom of expression.

15. These changes cannot be justified in a free and democratic society that is committed to protecting the best interests of children and should be quashed or declared of no force and effect.

### ***B. Terminology***

16. For the purposes of this Application, the following terminology, adopted from the Canadian Paediatric Society and the Canadian Bar Association, will be used:

- a. “assigned sex at birth” refers to a person’s initial designation as male or female at birth, this label is based on the child’s genitalia and other visible physical sex characteristics;

- b. “cisgender” refers to individuals whose gender identity aligns with their sex assigned at birth;
- c. “gender-diverse” is a broad term used to describe people with gender expressions or identities that are different from their assigned sex at birth. The term acknowledges and includes the vast diversity of existing gender identities. It replaces terms such as gender-nonconforming, gender-incongruent, and gender-variant, all of which have pathologizing or exclusionary connotations;
- d. “gender expression” refers to the way a person portrays gender to others through external means, such as clothing, appearance, or mannerisms; this may or may not reflect gender identity;
- e. “gender identity” also called “experienced” or “affirmed” gender refers to an individual’s internal, psychological sense of their own gender;
- f. “non-binary” refers to a gender identity that is neither entirely male nor entirely female;
- g. “transgender” refers to an umbrella term used to describe all individuals with a gender identity that differs from their sex assigned at birth and physical sex characteristics;
- h. “Two-spirit” refers to a person who identifies as having both a masculine and a feminine spirit, this term is used by some Indigenous communities and can encompass cultural, spiritual, sexual and/or gender identity;
- i. “2SLGBTQIA+” (a variation of LGBTQ) is an umbrella term which stands for Two-spirit, lesbian, gay, bisexual, trans, queer, questioning, intersex, asexual, and others, and encompasses some of the more common terms used to denote identity and community affiliation.<sup>3</sup>

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<sup>3</sup> Ashley Vandermorris & Daniel L. Metzger, *Position Statement: An Affirming Approach to Caring for Transgender and Gender-Diverse Youth* (Canadian Paediatric Society, 2023), online: <https://cps.ca/en/documents/position/an-affirming-approach-to-caring-for-transgender-and-gender-diverse-youth>; Canadian Bar Association, *Practice Tool: Sexual Orientation, Gender Identity and Gender Expression*, online: <https://www.cba.org/Publications-Resources/Practice-Tools/Child-Rights-Toolkit/theChild/Sexual-Orientation-Gender-Identity-and-Gender-Expr>



### ***C. Background: Creating Policy 713 to protect 2SLGBTQIA+ students***

17. Transgender people, according to the Supreme Court of Canada, occupy a unique position of disadvantage in our society. Transgender people face discrimination and disadvantage relative to the general public in all aspects of life.<sup>4</sup>

18. In 2017, the Legislature amended the *Human Rights Act*, RSNB 2011, c 171 to add “gender identity or expression” as prohibited grounds of discrimination.<sup>5</sup> Gender identity is now a protected ground of discrimination in every provincial, territorial, or federal human rights code, which have quasi-constitutional status.

19. In 2020, the **Department of Education and Early Childhood Development** (Department) created Policy 713: Sexual Orientation and Gender Identity (Policy 713) to respond to the unique needs of 2SLGBTQIA+ students in public schools.

20. Policy 713 was designed to create pathways for recognizing the equality rights and dignity of 2SLGBTQIA+ students in school. The Minister signed the original Policy 713 on August 17, 2020.

21. The purpose of Policy 713 is to set minimum requirements for school districts and public schools “to create a safe, welcoming, inclusive, and affirming school environment for all students, families, and allies who identify or are perceived as LGBTQI2S.”

22. Under Policy 713, a “preferred name” “refers to a name that has been identified by a transgender or non-binary student to be used in place of their legal first name” and a “preferred pronoun” “refers to a pronoun that has been identified by a transgender or non-binary student that aligns with their gender identity.”

23. The original Policy 713 included the following provisions on self-identification and the use of preferred names and pronouns:

6.3.1 School personnel will consult with a transgender or non-binary student to determine their preferred first name and pronoun(s). The preferred first name and pronoun(s) will be used consistently in ways that the student has requested.

6.3.2 Transgender or non-binary students under the age of 16 will require parental consent in order for their preferred first name to be officially used for record-keeping purposes and daily management (EECD, school district, and school software applications, report cards, class lists, etc.).

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<sup>4</sup> *Hansman v Neufeld*, 2023 SCC 14 at paras 85-86

<sup>5</sup> *An Act to Amend the Human Rights Act*, SNB 2017, c 14, s 3

Before contacting a parent, the principal must have the informed consent from the student to discuss their preferred name with the parent. If it is not possible to obtain parental consent for the use of the preferred first name, a plan will be put in place to support the student in managing the use of the preferred name in the learning environment.

24. The original Policy 713 prohibited the misgendering or deadnaming of transgender students in a classroom. Misgendering is the act of referring to someone with a word, especially a pronoun, that does not reflect their gender identity. Deadnaming is the act of referring to someone with a name that does not reflect their gender identity.

25. Research by experts in child well-being establishes that misgendering and deadnaming are harmful acts. Research further establishes that a failure to affirm 2SLGBTQIA+ students leads to negative educational and health outcomes, including increased risk of depression, anxiety, eating disorders, self-harm, and suicide.

26. The original Policy 713 struck a careful balance between the rights of 2SLGBTQIA+ students and parental authority for making certain decisions about children. Formal name changes on official records, which require a legal name change, also required parental consent for students under the age of 16. However, informal use of “preferred names” or “preferred pronouns” in the classroom did not require parental consent.

27. The original Policy 713 was consistent with leading pediatric and education guidelines, which recommend that an affirming approach be adopted for transgender or gender-diverse children and youth. The provisions recognized the serious psychological and physical harms that can result when 2SLGBTQIA+ children and youth are not affirmed. The provisions also recognized that some homes are not safe for some 2SLGBTQIA+ children and youth---a reality that is laid bare by the overrepresentation of 2SLGBTQIA+ children and youth in homeless populations and the child protection system.

#### ***D. The flawed and unfair review and decision-making processes***

##### ***(i) The Minister’s first revision to Policy 713 (June 8, 2023)***

28. At some point in 2023, the Department began reviewing Policy 713. The Department did not post a news release about the review on its website. The catalyst and reasons for the review

remain unclear, though vague references to “misinterpretations and complaints” were proffered by elected and unelected officials as the basis for the review.

29. In late April 2023, the Department advised 2SLGBTQIA+ inclusive organizations that it was pausing funding of gender identity and expression workshops pending the review of Policy 713.

30. On April 28, 2023, the **New Brunswick Child & Youth Advocate** (Advocate) wrote to the Department asking several questions related to the process and substance of the review.

31. By letter dated May 5, 2023 in response, the Deputy Minister and Acting Deputy Minister for the Department advised:

- a. there were no benchmarks for the review or relevant report prepared by staff;
- b. the District Education Councils had not been formally advised of the review;
- c. no written advice had been provided to the Minister or his Deputies in the four weeks prior to the decision to undertake the review;
- d. the whole of the policy is under review but specific concerns had been raised about the gender-identification provisions;
- e. legal guidance was not sought before deciding to review the policy but would be part of the review process; and
- f. the process for the review was being established.

32. That same day, the Department revealed publicly to the news media that it was reviewing Policy 713 after hearing “concerns” from some parents. When the Department responded to a freedom of information request seeking copies of these concerns or complaints, the Department advised that it had no responsive records and “does not have written complaints of parents who were concerned that they were not contacted by schools for their children using either a preferred pronoun or a name other than the one assigned to them at birth.”

33. On May 16, 2023, the Advocate provided findings and recommendations to the Legislature concerning the review.

34. The Advocate found that the review process was “broken and incoherent.” He noted that the Department had only provided him with three parent emails as the foundation for the purported “misinterpretations and complaints” that precipitated the review, that there was no

evidence of complaints from school professionals or students, and that there were no benchmarks identified for evaluating Policy 713 using an evidence-based rationale.<sup>6</sup>

35. The Advocate expressed concern about the rhetoric in the complaints that the Department shared as the foundation for initiating the review, including remarks like the following:

- a. “Are our children being taught this completely unscientific nonsense that one can just pick their gender and that they aren’t even necessarily a boy or girl.”
- b. “Walking into the school, there is flags everywhere, there’s events promoting and supporting. ... Change needs to be made and as a tax payer who helps fund the school system, my child should not be demeaned or put on a back burner especially their education to please and push the agenda of the LGBTQ2 community.”
- c. “It has come to my attention that a grade 5 class of children at [redacted] school had a zoom meeting with a transgender person who told the children that they could be whatever they want to be. ... Where is the education in teaching children lies and falsehoods? ... The schools should have no place teaching kids about sexuality and gender choices. ... Can I count on you to help make NB great again by resisting the influence of the World Economic Forum and their far left woke friends who push for this garbage to be in our schools and health care systems. How about we actually ‘follow the science’ and insist that humans are created male and female and nothing can change that.”<sup>7</sup>

36. The Advocate made several recommendations, including:

- a. stopping the review until terms of reference were developed;
- b. consulting with District Education Councils to determine whether there were particular concerns with Policy 713;

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<sup>6</sup> Office of the Child and Youth Advocate, *Findings and Recommendations: Results of the Advocate’s Investigation into the Decision of the Department of Education and Early Childhood Development to Place Policy 713 Under Review* (16 May 2023)

<sup>7</sup> Office of the Child and Youth Advocate, *Findings and Recommendations: Results of the Advocate’s Investigation into the Decision of the Department of Education and Early Childhood Development to Place Policy 713 Under Review* (16 May 2023)

- c. consulting with members of the school community, especially directly affected students where appropriate; and
- d. developing clear criteria and timelines for the review.<sup>8</sup>

37. On May 27, 2023, the Premier of New Brunswick issued a statement concerning the review of Policy 713. The Premier indicated that “[w]e are reviewing three sections of the policy that are causing confusion and misunderstanding,” particularly those concerning self-identification and sports.<sup>9</sup> He urged New Brunswickers to “tell your elected representative how you feel” but otherwise did not articulate any formal process for the review.

38. Following the Premier’s statement, the Department did not publicize or announce any formal process for the review. It is unclear whether any “review process” was ever established, even on a confidential or non-public basis.

39. On May 31, 2023, the Premier spoke to the news media about his confidence in the Minister, stating: “He [the Minister] believes that parents play a role in a child’s upbringing, and we have confidence that he will present something to us at the end of the day that will work for everyone.”<sup>10</sup>

40. Two weeks later, on June 8, 2023, the Department issued a media release announcing revisions to Policy 713, particularly the self-identification provisions.

41. The revised Policy 713 included the following provisions on self-identification and the use of preferred names and pronouns:

6.3.1 School personnel will consult with a transgender or non-binary student who is 16 and over to determine their preferred first name and pronoun(s). The preferred first name and pronoun(s) will be used consistently in ways that the student has requested.

6.3.2 Transgender or non-binary students under the age of 16 will require parental consent in order for their preferred first name to be officially used for record- keeping

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<sup>8</sup> Office of the Child and Youth Advocate, *Findings and Recommendations: Results of the Advocate’s Investigation into the Decision of the Department of Education and Early Childhood Development to Place Policy 713 Under Review* (16 May 2023)

<sup>9</sup> Office of the Premier, “Premier’s statement on review of Policy 713” (27 May 2023), online: <[https://www2.gnb.ca/content/gnb/en/departments/premier/news/news\\_release.2023.05.0266.html](https://www2.gnb.ca/content/gnb/en/departments/premier/news/news_release.2023.05.0266.html)>

<sup>10</sup> Jacques Poitras, “Premier ‘disappointed’ with mother’s comments on LGBTQ review but doesn’t contradict them”, CBC News (31 May 2023), online: <<https://www.cbc.ca/news/canada/new-brunswick/premier-mother-lgbtq-review-1.6860954>>

purposes and daily management (EECD, school district, and school software applications, report cards, class lists, etc.). If it is not possible to obtain consent to talk to the parent, the student will be directed to the appropriate professional (i.e. school social worker, school psychologist) to work with them in the development of a plan to speak with their parents if and when they are ready to do so. If it is not in the best interest of the child or could cause harm to the student (physical or mental threat), the student will be directed to the appropriate school professional for support.

42. The changes removed the prohibition against misgendering or deadnaming students under the age of 16. The changes required 2SLGBTQIA+ students who did not have parental consent to use their preferred name or pronouns to be referred to social workers or school psychologists to develop a plan to disclose their gender identity to their parents. The changes removed the requirement to informally use a 2SLGBTQIA+ student's preferred name and pronouns while steps were being taken to obtain parental consent.

43. In the Legislature, the Minister defended these changes as required to “respect parental rights.”<sup>11</sup> He explained that he had received “900-plus emails ... calls ... texts ... and [other] communications ....”<sup>12</sup> He further explained that he “consulted an overwhelming majority of groups in the province ... students, parents, and teachers” and that he “made the changes that were asked of us.”<sup>13</sup> He stated that preferred names would not be used for 2SLGBTQIA+ students without parental consent and that the misgendering or deadnaming of 2SLGBTQIA+ students would required:

On the topic of name preference, the names given by the parents must be respected if we do not have parental consent for a teacher to change the name of a child in the classroom, unless the student is at least 16 years old.<sup>14</sup>

(ii) The Advocate's report to the Legislature and the Minister's second revision to Policy 713 (August 23, 2023)

44. On June 15, 2023, the Legislature adopted a motion calling on the Advocate to “conduct a full consultation with relevant stakeholders on any changes to Policy 713 and the impact of such changes and make public the results of all such consultations by August 15, 2023.”<sup>15</sup>

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<sup>11</sup> New Brunswick. Legislature. Hansard. 60<sup>th</sup> Leg., 2<sup>nd</sup> Sess. (8 June 2023), p 11

<sup>12</sup> New Brunswick. Legislature. Hansard. 60<sup>th</sup> Leg., 2<sup>nd</sup> Sess. (8 June 2023), p 5

<sup>13</sup> New Brunswick. Legislature. Hansard. 60<sup>th</sup> Leg., 2<sup>nd</sup> Sess. (8 June 2023), p 7

<sup>14</sup> New Brunswick. Legislature Hansard. 60<sup>th</sup> Leg., 2<sup>nd</sup> Sess. (8 June 2023), p 7

<sup>15</sup> New Brunswick. Legislature. Journal of Assembly. 60<sup>th</sup> Leg., 2<sup>nd</sup> Sess. (15 June 2023)



45. As requested, the Advocate conducted a review of the changes to Policy 713, which included soliciting input from experts and directly affected people.
46. In his report, *On Balance, Choose Kindness*, the Advocate observed that the changes to Policy 713 were “pushed through to demonstrate rhetorical support for a principle, but failed to take the steps a government would take to approach a matter with competence and seriousness.”<sup>16</sup>
47. The Advocate concluded that the revised Policy 713 raised serious issues concerning the privacy rights, human rights, and *Charter* rights of 2SLGBTQIA+ students.
48. On August 23, 2023, the Department notified the public that the Minister had made further “clarifying” revisions to Policy 713 in response to the Advocate’s report.
49. The Minister did not provide notice before making these further revisions and did not solicit input from subject-matter experts or those who would be directly affected by his decision.
50. The further revised Policy 713 included the following provisions on self-identification and the use of preferred names and pronouns:

### 3.0 Definitions

...

**Formal use of preferred first name** refers to the preferred first name and/or pronoun(s) that has been identified by a transgender or non-binary student to be used for record-keeping purposes, daily management (school software applications, report cards, class lists, etc.), classroom interactions and extracurricular and co-curricular activities (by staff, teachers and coaches).

...

**Informal use of preferred first name** refers to the preferred first name and/or pronoun(s) that has been identified by a transgender or non-binary student to be used in social interactions outside of classroom interactions.

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<sup>16</sup> Office of the Child and Youth Advocate, *On Balance, Choose Kindness: The Advocate’s Review of Changes to Policy 713 and Recommendations for a Fair and Compassionate Policy* (15 August 2023), p 79 online: <  
[https://www.legnb.ca/content/house\\_business/60/2/tables\\_documents/2023-08-15%20EN.pdf](https://www.legnb.ca/content/house_business/60/2/tables_documents/2023-08-15%20EN.pdf)>

### **6.3 Self-identification**

**6.3.1** School personnel will consult with a transgender or non-binary student who is 16 and over to determine their preferred first name and pronoun(s). The preferred first name and pronoun(s) will be used consistently in ways that the student has requested.

**6.3.2** Formal use of preferred first name for transgender or non-binary students under the age of 16 will require parental consent.

If it is not possible to obtain consent to talk to the parent, the student will be encouraged to communicate with the appropriate professionals to develop a plan to speak with their parents when they are ready to do so.

If it is not in the best interest of the student or could cause harm to them (physically or mentally) to talk with their parents, they will be encouraged to communicate with professionals for support.

51. The further changes maintained aspects of the policy that would require the misgendering or deadnaming of 2SLGBTQIA+ students. This had been expressly prohibited in the original Policy 713. The further changes altered the referral of 2SLGBTQIA+ students to social workers or school psychologists, changing this from a “requirement” to an “encouragement.” The further changes maintained the removal of the requirement to use a 2SLGBTQIA+ student’s preferred name and pronouns in the classroom while steps were being taken to talk with parents. This had been expressly authorized in the original Policy 713

52. In a press conference on August 23, 2023, the Minister explained that any classroom use of a 2SLGBTQIA+ student’s preferred name or pronouns would be considered “formal use” and therefore required the consent of parents.<sup>17</sup> Three days later, the Minister explained that the policy does not apply to the nicknames of cisgender students and only applied to names associated with a gender identity that was different than a child’s sex assigned at birth: “What we’re talking about is a name that’s attached to a different gender than what they’re identified

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<sup>17</sup> Hadeel Ibrahim, “NB Digs in on rules for teachers and name, pronoun use of LGBTQ students”, CBC News 23 Aug 2023, online: <https://www.cbc.ca/news/canada/new-brunswick/policy-713-education-changes-1.6944879>; “N.B. doubles down on LGBTQ school policy after report says it violates Charter rights”, CTV News 23 Aug 2023, online: <https://atlantic.ctvnews.ca/n-b-doubles-down-on-lgbtq-school-policy-after-report-says-it-violates-charter-rights-1.6531389>

with their parents.”<sup>18</sup> If there was ambiguity, for instance a student who prefers a shortened version of their name that is gender neutral, the Minister further explained, “teachers can always ask.”<sup>19</sup>

(iii) The Minister’s review process and decisions breached the duty of fairness

53. When the Minister decided to change the self-identification provisions in Policy 713, he was exercising delegated authority or discretion conferred on him by the Legislature. Paragraph 6(b.2) of the *Education Act*, SNB 1997, c E-1.12 provides:

6. The Minister

...

(b.2) may establish, within the scope of this Act, provincial policies and guidelines related to

(i) public education,

(ii) the health and well-being of pupils and school personnel,

(iii) the transportation of pupils,

(iv) school infrastructure, and

(v) investigations with respect to allegations of serious professional misconduct, and

...

54. The Minister’s decision to change the self-identification provisions in Policy 713 engaged the rights, privileges, and interests of 2SLGBTQIA+ students. Accordingly, the duty of fairness applied to the Minister’s review of Policy 713 and subsequent decisions.

55. Given the nature of the decision being made, the requirements of the *Education Act*, SNB 1997, c E-1.12, the importance of the decision to 2SLGBTQIA+ students, and the legitimate expectations of 2SLGBTQIA+ students, the duty of fairness was at the mid-level of the spectrum.

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<sup>18</sup> Hadeel Ibrahim, “Teachers can ask if student is changing gender or just wants a nickname, minister says”, CBC News 26 Aug 2023, online: <https://www.cbc.ca/news/canada/new-brunswick/new-brunswick-gender-identity-policy-713-teachers-1.6947385>

<sup>19</sup> Hadeel Ibrahim, “Teachers can ask if student is changing gender or just wants a nickname, minister says”, CBC News 26 Aug 2023, online: <https://www.cbc.ca/news/canada/new-brunswick/new-brunswick-gender-identity-policy-713-teachers-1.6947385>

<sup>20</sup> *Education Act*, SNB 1997, c E-1.12, ss 6(b.2)

56. Regardless of the level of fairness owed to 2SLGBTQIA+ students, the process leading to the changes to the self-identification provisions in Policy 713 was procedurally unfair for several reasons:

- a. the Minister failed to provide adequate notice of the review and its terms of reference;
- b. the Minister failed to adequately consult with subject-matter experts and directly affected groups, including 2SLGBTQIA+ students where age appropriate;
- c. the Minister displayed a closed mind, reasonable apprehension of bias, and/or bad faith during the process, including by initiating a review in response to anti-2SLGBTQIA+ rhetoric from a small group of people and in the absence of a staff report and reasonable assessment raising problems with the original policy; and
- d. the Minister failed to provide sufficient written reasons that are capable of judicial review.

***E. The Minister is bound by the Education Act and the Human Rights Act***

57. The Minister's decisions to change the self-identification provisions in Policy 713 were *ultra vires* because they did not accord with the *Education Act*, SNB 1997, c E-1.12 or the *Human Rights Act*, RSNB 2011, c 171.

58. Paragraph 6(b.2) of the *Education Act*, SNB 1997, c E-1.12 does not confer unfettered discretion on the Minister to develop provincial policies in any way he likes or prefers. Rather, the Minister is only empowered to develop policies "within the scope of this Act."<sup>21</sup>

59. The purpose of the *Education Act*, SNB 1997, c E-1.12 is to create a school system that is "founded on the principles of free public education, linguistic duality and the **inclusion of all pupils**."<sup>22</sup> The Minister's changes to Policy 713 will result in exclusion not inclusion of transgender and gender-diverse students.

60. The *Education Act*, SNB 1997, c E-1.12 also includes a legislated right to a "positive learning and working environment," which means a "safe, productive, orderly and respectable learning and working environment free from bullying, cyberbullying, harassment and other

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<sup>21</sup> *Education Act*, SNB 1997, c E-1.12, s 6(b.2)

<sup>22</sup> *Education Act*, SNB 1997, c E-1.12, s 1.1 [emphasis added]

forms of disruptive or non-tolerated behaviour or misconduct ....”<sup>23</sup> Misgendering or deadnaming 2SLGBTQIA+ students is a form of bullying or harassment that is prohibited by the Act. The changes to the self-identification provisions in Policy 713 require teachers to engage in conduct that constitutes bullying and harassment that is prohibited by the Act. As such, the changes were *ultra vires* the Minister insofar as they amount to conduct that is expressly prohibited by the Act.

61. The Minister’s discretion was also constrained by the *Human Rights Act*, RSNB 2011, c 171, which prohibits discrimination based on gender identity or gender expression in the provision of services.<sup>24</sup>

62. Public school education is a service within the meaning of the Act and “gender identity” and “gender expression” are prohibited grounds of discrimination under the Act.

63. The Minister’s changes to the self-identification provisions of Policy 713 treat transgender and gender-diverse students differently than cisgender students. The former are prohibited from having their preferred names and pronouns affirmed in the classroom without their parent’s consent, but the latter require no special procedures or parental consent for the same treatment. The failure to use a transgender or gender-diverse student’s chosen name and pronoun can be critical to their privacy, safety, and mental health, so it is a particularly adverse impact to deny this equal treatment to those who need it most..

64. The Minister neither acknowledged nor attempted to justify the adverse impact that his decision will have on 2SLGBTQIA+ students.

65. The changes to the self-identification provisions in Policy 713 were *ultra vires* the Minister insofar as they amount to discrimination that is expressly prohibited by the Act.

#### ***F. The revised Policy 713 infringes sections 15(1), 7, and 2 of the Charter***

66. All exercises of statutory discretion must accord with the *Charter*. The Minister’s changes to the self-identification provisions of Policy 713 infringe sections 15(1), 7, and 2 of the *Charter*. Exercises of discretion that ignore a wide body of evidence on the best interests of 2SLGBTQIA+ children, and instead wilfully, recklessly, or carelessly harm 2SLGBTQIA+ students, cannot be justified in a free and democratic society.

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<sup>23</sup> *Education Act*, SNB 1997, c E-1.12, ss 1, 27, 28, 48

<sup>24</sup> *Human Rights Act*, RSNB 2011, c 171, ss 2.1, 3, 6

(i) The Minister's exercise of discretion to revise Policy 713 is government action

67. The Minister is a representative of government. When he exercised his discretion to change the self-identification provisions in Policy 713, he was exercising authority conferred on him by paragraph 6(b.2) of the *Education Act*, SNB 1997, c E-1.12.<sup>25</sup>

68. The *Charter* applies to all matters within the authority of the legislature of each province. Accordingly, the *Charter* applies to the Minister's changes to Policy 713.

(ii) The revised Policy 713 discriminates against 2SLGBTQIA+ students

69. Subsection 15(1) of the *Charter* provides:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

70. The revisions to Policy 713 infringe the right to equality and non-discrimination under subsection 15(1) of the *Charter*.

71. The revised Policy 713 creates a distinction based on enumerated or analogous grounds, on its face or in its impact.

72. The self-identification provisions in the revised Policy 713 treat transgender or gender-diverse students differently than cisgender students. Special and restrictive rules for preferred name and pronoun recognition apply only to transgender and gender-diverse students and not to cisgender students.

73. These rules apply differently to transgender and gender-diverse students based on their sex, gender identity, and/or gender expression. Sex is an enumerated ground of discrimination. Gender identity and gender expression are analogous grounds that should be recognized as grounds of discrimination.

74. There is no policy requiring cisgendered students to seek parental permission to use a nickname or alternative name informally in the classroom.

75. The special and restrictive rules for the recognition of transgender and gender-diverse students' preferred names and pronouns deny a benefit that is offered to cisgender students and

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<sup>25</sup> *Education Act*, SNB 1997, c E-1.12, s 6(b.2)



have the effect of reinforcing, perpetuating, or exacerbating disadvantage. The benefit is a school or classroom that respects and accepts a student for who they are without question.

76. The changes to the self-identification provisions in Policy 713 require that transgender and gender-diverse students be disaffirmed and misgendered unless they can satisfy the state that they meet special and restrictive conditions that are not imposed on cisgender students.

77. The reason for these special and restrictive rules is the prejudicial notion that being transgender or gender-diverse is a category of personhood that is undesirable and requires parental consent.

78. The changes to the self-identification provisions in Policy 713 reinforce and exacerbate disadvantage that is already inordinately faced by 2SLGBTQIA+ students. The changes increase the likelihood that these students will be disaffirmed and misgendered with all the known harms that are associated with these acts.

(iii) The revised Policy 713 infringes the liberty and security of the person rights of 2SLGBTQIA+ students

79. Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

80. Gender identity and gender expression are decisions of fundamental personal importance. Gender cognition emerges early in life. Recent research shows that some children recognize a “mismatch” between their gender identity and their assigned sex as early as age 2 to 3 years. Other research shows that children can have a strong sense of gender identity when they are school-aged, though for some this does not emerge until puberty or beyond.

81. The changes to the self-identification provisions in Policy 713 constitute state interference with the right of 2SLGBTQIA+ students to a protected sphere of autonomy over decisions of fundamental personal importance.

82. In particular, the revised policy removes decision-making power for mature minors and exposes them to a vague and convoluted process to have their personhood recognized.

83. The process also engages the security of the person interests of 2SLGBTQIA+ students by requiring the referral of mature minors, who do not have the consent of their parents, to social

workers and psychologists. These referrals are not predicated on clinical need and pathologize students who are transgender or gender-diverse.

84. While the revised Policy 713 uses the word “encourage” with respect to referrals, it is the only means for 2SLGBTQIA+ students, under the age of 16 years, to achieve affirmation in the classroom if they do not already have support of their parents. This makes the referral process mandatory if 2SLGBTQIA+ wish to have their preferred name or pronouns used in the absence of parental consent.

85. The referral process itself is likely to be lengthy given the existing availability and waitlists for psychological and learning supports for students who actually require clinical care. For 2SLGBTQIA+ students who choose to follow the referral process, the delay will cause serious and profound psychological harm because it will prolong the institutional misgendering and deadnaming that the revised Policy 713 requires.

86. Engaging in the referral process does not guarantee that 2SLGBTQIA+ students will have their gender identity affirmed in the interim or at any point in time. The revised Policy 713 does not require teachers to use a 2SLGBTQIA+ student’s preferred name or pronouns while they are engaging with a social worker or psychologist, even if that professional were to state that such use was clinically indicated and in the student’s best interest.

87. The revised Policy 713 imposes a parental consent requirement for 2SLGBTQIA+ students, under the age of 16 years, to have their preferred name and pronouns used, even informally in the classroom. There is no flexibility to this requirement, even where the student is a mature minor and disclosing their gender identity to their family could harm them.

88. As a result, in some circumstances, mature 2SLGBTQIA+ students, under the age of 16 years, must choose between affirmation of their personhood and exposure to harm. This causes serious and profound psychological harm.

89. Sustained misgendering and deadnaming students contributes to psychological stress and harms that can have lasting consequences.

90. These infringements of the liberty and security of the person interests of 2SLGBTQIA+ students do not accord with principles of fundamental justice. Specifically, the revised Policy 713 is arbitrary, overbroad, and grossly disproportionate.

91. The self-identification provisions in the revised Policy 713 are arbitrary because they will make public schools less safe, welcoming, inclusive, and affirming for 2SLGBTQIA+ students,

which is the stated purpose of Policy 713. The changes are not connected to any legitimate state objective.

92. Even if it is reasonable for parents to limit affirmation of 2SLGBTQIA+ students who are unable to make independent decisions—an argument that CCLA does not concede—the self-identification provisions in the revised Policy 713 are overbroad because they prohibit the affirmation of some mature 2SLGBTQIA+ students, under the age of 16 years, who are psychologically and legally capable of making fundamental personal decisions on their own without parental input, in circumstances where there is no requirement for approval by a legal parent or guardian.

93. The self-identification provisions in the revised Policy 713 are grossly disproportionate because they prohibit the affirmation of some mature 2SLGBTQIA+ students, under the age of 16 years, in instances where seeking parental consent would not be in the best interests of the child and where doing so could expose the child to mental or physical harm.

(iv) The revised Policy 713 limits the freedom of expression of 2SLGBTQIA+ students

94. Section 2(b) of the *Charter* provides:

2 Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

95. One of the well-established purposes of freedom of expression is protection for the diversity in forms of individual self-fulfillment and human flourishing. Different forms of free expression ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed.

96. An individual's name and pronouns are a core aspect of their identity and a fundamental expression of themselves.

97. A 2SLGBTQIA+ student's demand for recognition of their gender identity and gender expression has expressive content because it conveys or attempts to convey meaning about their personhood. As such, these types of demands fall within the protected scope of section 2(b) of the *Charter*.

98. Asking for affirmation in the classroom is entirely consistent with the purpose of inclusive education. There is nothing about the method or location of demands for recognition of gender identity or gender expression in the classroom that remove such requests from protection.

99. The self-identification provisions in the revised Policy 713, in purpose or effect, restrict freedom of expression because they limit when and how 2SLGBTQIA+ students can be affirmed and the likelihood of open and safe discussions about gender identity or gender expression.

100. Teachers are prevented by the revised Policy 713 from affirming students in their classrooms, even where such affirmation is clinically indicated by social workers or psychologists. As a result, every time a 2SLBTQIA+ student participates in class, there will be a public disconnect between how teachers are permitted to respond and a student's gender identity. This will limit their expression, not just about gender, but about any topic. This puts teachers in an untenable position that contradicts their professional obligations and prohibits the exercise of their professional judgement in determining how best to respond to 2SLBTQIA+ students.

101. 2SLGBTQIA+ students who do not have parental consent and who approach their teachers seeking affirmation will be encouraged to seek professional support and exposed to a vague, convoluted, unnecessary, and lengthy approval process. This has the effect of decreasing the likelihood that 2SLGBTQIA+ students will share their gender identity and gender expression with teachers in the classroom, who may be the only trusted adult in a child or youth's life.

(v) The revised Policy 713 cannot be demonstrably justified in a free and democratic society

102. The Minister's changes to Policy 713 were not responsive to an identifiable problem with the original Policy 713 or to any legitimate pressing and substantial objective.

103. The Minister's changes to Policy 713 are not rationally connected to the inclusion of 2SLGBTQIA+ students in public schools or to the best interests of 2SLGBTQIA+ children. On the contrary, the changes to Policy 713 will make school less safe and welcoming for 2SLGBTQIA+ students.

104. The Minister's changes to Policy 713 are not minimally impairing. While parental involvement in the lives of children is an important principle, this can be achieved without harming the rights and best interests of 2SLGBTQIA+ students.

105. The original Policy 713 showed that 2SLGBTQIA+ students could be protected and supported without depriving parents of playing a fundamental and leading role in the lives of their children.

106. The Minister's changes to Policy 713 are not proportionate. Harming and disadvantaging children in the name of parental interests is antithetical to any notion of proportionately.

107. As such, the Minister's changes to Policy 713 cannot be demonstrably justified in a free a democratic society.

#### ***G. Costs***

108. CCLA is a non-profit organization that has brought this Application in the public interest. CCLA does not seek costs and should be relieved of any adverse costs award if its Application is unsuccessful.

### **IV. EVIDENCE**

109. The following documentary evidence will be used at the hearing of the application:

- a. Affidavit of Harini Sivalingam, Director of the Equality Program, CCLA, to be sworn and filed;
- b. Affidavits of expert witnesses, to be sworn and filed; and
- c. Such further or other documentary evidence as counsel advises and the Court permits.

DATED at Fredericton, New Brunswick,  
this 6th day of September, 2023.



\_\_\_\_\_  
Lawyer for applicant

FAIT à Fredericton, Nouveau-Brunswick, le  
6e septembre 2023.

\_\_\_\_\_  
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